the right to search for negotiable instruments and securities, we have impliedly admitted the right to break the covers and delay the transmission of "genuine correspondence". Perhaps the answer of the State Department to the British communication of October 12th, which has not yet been given out, will make our position more clear and consistent.

WAR AS EXCUSE FOR FAILURE TO PERFORM CONTRACT.—Whether the fact that a war has rendered impossible the performance of a contract will serve to excuse failure to perform it is, of course, dependent primarily on the proper formulation of the rule as to impossibility of performance in general. The difficulties attendant on the framing of any satisfactory rule are obvious; but a statement of the principle may perhaps be attempted as follows: impossibility of performance, *per se*, is never an excuse; but where, from all the circumstances of the case, the parties may be said to have intended that a condition be implied in fact, to the effect that the cause of the impossibility do not occur, then, the condition having been broken, performance is excused.[1] If, then, this be taken as the rule, performance of a contract rendered impossible by war will be excused only when the parties may fairly be said to have intended one of two conditions to be made a part of the contract: either (1) that performance be not rendered impossible by any cause whatever,—which, of course, would include war; or (2) that performance be not rendered impossible by certain specific causes, including war.[2]

Ordinarily, of course, no such condition is to be implied, and therefore, in the normal case, impossibility caused by war does not excuse failure to perform. This appears clearly where the undertaking is intended by the parties to be absolute.[3] Then, on the other hand, it is equally obvious that, where there is an express or implied affirmative term in the contract, impossibility caused by war will not serve as an excuse.[4] But whether, in any particular case, a condition is to be implied excusing performance when war makes it impossible, one is almost never implied where performance is merely rendered extremely

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[1] *Cf.* Anson, Contracts (11th ed.) 396; Wald's Pollock, Contracts (Williston's ed.) 520; 1 Columbia Law Rev. 529; 11 *id.* 83. For the general subject, see Trotter, Law of Contract During War, 54.

[2] Somewhat similar principles govern where the defense to an action on contract is based on the theory that the consideration for the defendant's promise has failed, since it is impossible, because of a war, for the plaintiff to perform his side of the contract. This class of cases is often confounded with the type of cases properly under discussion here, *viz.*, those cases where the defense is that it is impossible for the defendant to carry out his promise. They are really distinct, however. Paradine *v.* Jane (1648) Aleyn 26 (which is usually cited as the leading case on impossibility of performance, but is really a case of failure of consideration); Robinson *v.* L'Engle (1870) 13 Fla. 482, 495; *cf.* Leiston Gas Co. *v.* Leiston-cum-Sizewell etc. Council [1916] 2 K. B. 428; but *cf.* Bayly *v.* Lawrence (S. C. 1792) 1 Bay, 499.

[3] Jacobs, Marcus & Co. *v.* Crédit Lyonnais (1884) 12 Q. B. D. 589; Ashmore & Son *v.* Cox & Co. [1899] 1 Q. B. 436; *cf.* Hadley *v.* Clarke (1799) 8 T. R. 259.

[4] De Medeiros *v.* Hill (1831) 5 Car. & P. 182; Smith & Co. *v.* Morse & Co. (1868) 20 La. Ann. 220; *cf.* Geipel *v.* Smith (1872) 7 Q. B. 404.

difficult.[5] Moreover, where performance is only delayed, it will ordinarily not be absolutely excused, though the obligation to perform may be suspended.[6] This is well shown by the recent case of *Millar & Co.* v. *Taylor & Co.* (Ct. of App.) [1916] 1 K. B. 402. There the plaintiffs contracted to sell candy to the defendants for export. On account of the war, the export of confectionery was prohibited by Proclamation; ten or fifteen days later, the prohibition was removed. Meanwhile, the plaintiffs had canceled the contract. In an action brought by the plaintiffs, the defendant counterclaimed for breach of contract. It was held that the mere delay was insufficient to permit the plaintiffs to cancel the contract, especially as the plaintiffs' obligation was merely to deliver within a reasonable time, and this was perfectly possible.

On the other hand, it is obvious that, in some cases, the parties do intend a condition to be implied, which would excuse performance when that is rendered impossible by war. Thus, the parties may expressly or impliedly contract to be excused where performance becomes impossible, either from any cause, or from war in particular.[7] This situation occurred lately in the case of *Thaddeus Davids Co.* v. *Hoffman-LaRoche Chemical Works* (Sup. Ct. App. Term, 1916) 160 N. Y. Supp. 973, where the court construed the expression "contingencies beyond your control"—which gave the defendants a right to cancel—as including impossibility of obtaining the subject-matter of the contract from Germany, due to the war. This case is unquestionably correct. Where both parties to the contract have to act, and the acts of both are rendered impossible of performance by war, it is fair to imply such a condition,[8] since the parties can hardly be supposed to have contracted to pay each other damages. Normally, moreover, the parties intend to imply a condition that neither will contravene any domestic law, so that when a contract becomes illegal under domestic law, as, for instance, where performance would involve trading with the enemy, it is excused.[9] But ordinarily there is no condition not to disobey a foreign law; and therefore when, due to war, a foreign law makes performance impossible, it is not excused.[10] Substantially similar considerations, coupled with the fact that, where the performance of a contract is dependent upon the existence of a

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[5]Elsey *v.* Stamps (1882) 78 Tenn. 709; Richards & Co. *v.* Wreschner (1915) 156 N. Y. Supp. 1054, aff'd. 158 N. Y. Supp. 1129; see Graves *v.* Miami Steamship Co. (1899) 29 Misc. 645, 61 N. Y. Supp. 115; 10 Columbia Law Rev. 478. Where one of two alternatives becomes impossible, and performance thereof is excused, the defendant is still bound to perform the other alternative. Jacquinet *v.* Boutron (1867) 19 La. Ann. 30.

[6]Hadley *v.* Clarke, *supra*; Cohen *v.* N. Y. Mut. Life Ins. Co. (1872) 50 N. Y. 610; Mutual Benefit Life Ins. Co. *v.* Hillyard (1874) 37 N. J. L. 444, 470.

[7]Geipel *v.* Smith, *supra;* Reid *v.* Hoskins (1856) 4 E. & B. 979; 5 *id.* 729; 6 *id.* 953; *cf.* Marks Realty Co. *v.* "Churchills" (1915) 90 Misc. 370, 153 N. Y. Supp. 264.

[8]Ford *v.* Cotesworth (1870) 5 Q. B. 544; *cf.* Beale v. Thompson (1803) 3 Bos. & P. 405.

[9]Reid *v.* Hoskins, *supra;* see Mutual Benefit Life Ins. Co. *v.* Hillyard, *supra*; Esposito *v.* Bowden (1857) 7 E. & B. 763; 16 Columbia Law Rev. 588.

[10]Jacobs, Marcus & Co. *v.* Crédit Lyonnais, *supra;* Richards & Co. *v.* Wreschner, *supra;* see 10 Columbia Law Rev. 478.

specific thing, its continued existence is usually the subject of a condition,[11] normally excuse performance, if the subject-matter of the contract is requisitioned by the government.[12]

An interesting variation of the usual problems in this class of cases was presented by the recent case of *Mitsui & Co.* v. *Watts, Watts, & Co.* (Ct. of App. 1916) 115 L. T. R. 248. The defendants contracted to send a ship to Mariopol, and load a cargo for the plaintiffs, "restraints of princes" excepted. Erroneously thinking that the voyage was already illegal, defendants failed to perform, and claimed on the trial that a reasonable belief that the expected outbreak of the war would render such voyage illegal served to excuse them. It was held that a reasonable apprehension of something which, if it happens, will excuse performance, is insufficient as an excuse. It might, perhaps, have been argued that the defendants took the risk of events so occurring subsequently that they would have been absolved from complete performance even had they sent the ship to Mariopol, and that the risk had eventuated in their favor; but the court took the sounder view that the defendants were absolutely bound to perform their contract, unless legally excused prior to the time of breach.

SEPARATION AGREEMENTS.—When the English Ecclesiastical Court, in which was vested jurisdiction over marriage questions, had to deal with separation agreements, it declared them wholly void as violative of the sacred nature of the marriage relationship,[1] and never during its entire history, until its abolition in 1857, did it grant to such agreements any sanction whatsoever.[2] The equity courts, on the other hand, did uphold them, even in the eighteenth century, at least to the extent of enforcing provisions for the separate maintenance of the wife,[3] since they considered themselves able to do this without coming into conflict with the ecclesiastical jurisdiction. It was not, however, until early in the nineteenth century that any clear rule was enunciated, and then it became settled in both law and equity courts that, where separation had in fact occurred, or was to occur immediately,[4] provisions made between the husband and a trustee for the wife[5] to insure her a separate maintenance were enforcible obligations, even where such stipulations were merely accessory to a main agreement for separation which was non-enforcible as against public policy.[6]

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[11]Wald's Pollock, Contracts (Williston's ed.) 536.

[12]*In re* Shipton, Anderson & Co. [1915] 3 K. B. 676; see Graves *v.* Miami Steamship Co., *supra.*

[1]Mortimer *v.* Mortimer (1820) 2 Hagg. Con. 310; Westmeath *v.* Westmeath (1827) 2 Hag. Eccl. Sup. 1, 115.

[2]See Foote *v.* Nickerson (1900) 70 N. H. 496, 498, 48 Atl. 1088.

[3]Seeling *v.* Crawley (1700) 2 Vern. *386; Angier *v.* Angier (1718) Pre. Ch. 496; Guth *v.* Guth (1792) 3 Bro. C. C. 614; see Fletcher *v.* Fletcher (1788) 2 Cox *99, *102; but see Foote *v.* Nickerson. *supra,* 500.

[4]If the agreement looked to a possible separation *in futuro* it was wholly void. Durant *v.* Titley (1819) 7 Price, 577; *contra,* Rodney *v.* Chambers (1802) 2 East, 283.

[5]The trustee was necessary because of the common law unity of husband and wife. See Legard *v.* Johnson (1797) 3 Ves. Jr. *352, *358.

[6]Worrall *v.* Jacob (1817) 3 Mer. 256; Jee *v.* Thurlow (1824) 2 B. & C. 547; Frampton *v.* Frampton (1841) 4 Beav. 287; see Warrender *v* Warrender (1835) 2 Cl. & F. 488, 527.